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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 JOYLYN D. GABBARD,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security Administration,

16 Defendant.

CASE NO. C07-5124RJB

REPORT AND RECOMMENDATION

Noted for August 21, 2009

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18 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28
19 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,
20 Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter is before the court on
21 plaintiff's motion for attorney's fees pursuant to 28 U.S.C. § 2412, The Equal Access to Justice
22 Act ("EAJA"). After reviewing the record, the Court should GRANT the motion.

23 DISCUSSION

24 The EAJA provides, in relevant part:

25 A party seeking an award of fees and other expenses shall, within thirty days of final
26 judgment in the action, submit to the court an application for fees and other expenses

1 which shows that the party is a prevailing party and is eligible to receive an award
2 under this subsection

3 28 U.S.C. § 2412(d)(1)(B). In any action brought by or against the United States, the EAJA
4 requires that "a court shall award to a prevailing party other than the United States fees and other
5 expenses . . . unless the court finds that the position of the United States was substantially
6 justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). An
7 applicant for disability benefits becomes a prevailing party for the purposes of the EAJA if the
8 denial of her benefits is reversed and remanded regardless of whether disability benefits
9 ultimately are awarded. Shalala v. Schaefer, 509 U.S. 292, 300-02 (1993); Corbin v. Apfel, 149
10 F.3d 1051, 1053 (9th Cir.1998).

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12 When assessing EAJA fee applications for cases that have been remanded because of an
13 administrative law judge's procedural error, "the relevant question is whether the government's
14 decision to defend on appeal the procedural errors committed by the ALJ was substantially
15 justified." Shafer v. Astrue, 518 F.3d 1067, 1071 (9th Cir.2008) (*citing* Corbin v. Apfel, 149
16 F.3d 1051, 1052-53 (9th Cir.1998)). The court should not focus on the government's defense of
17 specific alleged errors. In Shafer, the Ninth Circuit Court of Appeals held that defending
18 "fundamental" errors, such as assessing a claimant's residual functioning capacity, are difficult to
19 justify. Shafer, 518 F.3d at 1072.

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21 Here, plaintiff is seeking an award of attorney's fees of \$18,487.93, costs of \$5,742.70,
22 and expenses of \$96.26. The attorney's fee request reflects approximately 43 hours of time
23 expended before this court, 61.5 hours of time expended presenting the matter to the 9th Circuit
24 Court of Appeals, and 4.1 hours of time on miscellaneous issues, including preparation of the
25 motion for fees.
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1 Previously the matter was reviewed and the administrative decision was affirmed by this
2 Court (finding no error in the ALJ's assessment of Plaintiff's credibility or consideration of the
3 medical evidence). Plaintiff timely filed an appeal. While on appeal, following briefing by the
4 parties, but prior to a decision on the merits, the parties filed a stipulation, agreeing to remand the
5 matter for further consideration. Based on the stipulation, the Ninth Circuit Court of Appeals
6 entered an Order on May 14, 2009, reversing and remanding for further administrative
7 proceedings.
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9 The undersigned has not been provided copies of the appellate briefing to review the
10 exact nature of the issues raised on appeal and the basis for the stipulation. Defendant's response
11 brief to the motion for fees conceded that procedural errors by the ALJ below rendered the
12 government's position not substantially justified. The government admitted errors and does not
13 plead substantial justification. Defendant argues that the fees asked for by Plaintiff are
14 nonetheless unreasonably excessive. Defendant asks the court to limit the number of hours to no
15 more than a total of 80 hours of time (40 hours in district court and 40 hours at the appellate
16 level).
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18 After reviewing the matter, the undersigned finds no justification for reducing the number
19 of hours submitted by Plaintiff. The 43 hours spent at the initial judicial review level is very
20 near the 40 hours argued by Defendant as being reasonable. The 61.5 hours of work expended
21 preparing the case for the Ninth Circuit is 20 hours more than recommended by the Defendant.
22 Defendant argues that the issues and the drafting of the briefs would logically be less time
23 intensive than when first developed for the Administrative Appeals Council and/or the U.S.
24 District Court. However, under Schafer the issue before the court is whether the government's
25 decision to defend on appeal the procedural errors committed by the ALJ were substantially
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1 justified. Significantly, Defendant conceded it was a procedural error that justified the
2 stipulation to remand the matter for further consideration, and defendant is not arguing that the
3 ALJ's procedural errors were substantially justified. Nor has the Defendant provided any
4 explanation for the timing of the stipulation, which arguably could have been negotiated before
5 all of the appellate briefing was completed. The mere fact that Plaintiff needed to spend more
6 time preparing the appellate case than the initial judicial review, does not by itself render the fee
7 unreasonable. It is certainly reasonable to conclude that the time required to properly prepare
8 appellate briefing could exceed the amount of time to prepare a brief for the trial court. This
9 court declines the invitation to limit those fees on appeal solely on that basis. Plaintiff's fees are
10 delineated and specific and should be awarded in total.

12 CONCLUSION

13 Based on the foregoing discussion, the Court should GRANT plaintiff's motion for EAJA
14 fees, expenses and costs. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules
15 of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written
16 objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
17 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the
18 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on
19 August 21, 2009, as noted in the caption.
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21 DATED this 27th day of July, 2009.
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25 J. Richard Creatura
26 United States Magistrate Judge